



FEDERAL TRADE COMMISSION

[File No. P222100]

HISA Assessment Methodology Rule

AGENCY: Federal Trade Commission.

ACTION: Notice of Horseracing Integrity and Safety Authority (HISA) proposed rule; request for public comment.

SUMMARY: The Horseracing Integrity and Safety Act of 2020 recognizes a self-regulatory nonprofit organization, the Horseracing Integrity and Safety Authority, which is charged with developing proposed rules on a variety of subjects. Those proposed rules and later proposed rule modifications take effect only if approved by the Federal Trade Commission. The proposed rules and rule modifications must be published in the *Federal Register* for public comment. Thereafter, the Commission has 60 days from the date of publication to approve or disapprove the proposed rule or rule modification. The Authority submitted to the Commission a proposed rule on Assessment Methodology on January 7, 2022. The Office of the Secretary of the Commission determined that the proposal complied with the Commission's rule governing such submissions. This document publicizes the Authority's proposed rule text and explanation, and it seeks public comment on whether the Commission should approve or disapprove the proposed rule.

DATES: If approved, the HISA proposed rule would take effect immediately. Comments must be received on or before [INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Comment Submissions part of the SUPPLEMENTARY INFORMATION section below. Write "HISA Assessment Methodology" on your

comment and file your comment online at <https://www.regulations.gov> under docket number FTC-2022-0014. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Austin King (202-326-3166), Associate General Counsel for Rulemaking, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

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Background:

The Horseracing Integrity and Safety Act of 2020¹ recognizes a self-regulatory nonprofit organization, the Horseracing Integrity and Safety Authority, which is charged with developing proposed rules on a variety of subjects. Those proposed rules and later proposed rule modifications take effect only if approved by the Federal Trade

¹ 15 U.S.C. 3051 through 3060.

Commission.² The proposed rules and rule modifications must be published in the *Federal Register* for public comment.³ Thereafter, the Commission has 60 days from the date of publication to approve or disapprove the proposed rule or rule modification.⁴

Pursuant to Section 3053(a) of the Horseracing Integrity and Safety Act of 2020 and Commission Rule 1.142, notice is hereby given that, on January 7, 2022, the Horseracing Integrity and Safety Authority (“HISA” or the “Authority”) filed with the Federal Trade Commission a proposed Assessment Methodology rule and supporting documentation as described in Items I, II, III, IV, and X below, which Items have been prepared by HISA. The Office of the Secretary of the Commission determined that the filing complied with the Commission’s rule governing such submissions.⁵ The Commission publishes this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization’s Statement of the Background, Purpose of, and Statutory Basis for, the Proposed Rule

a. Background and Purpose

The Horseracing Integrity and Safety Act of 2020 recognizes that the establishment of a national set of uniform standards for racetrack safety and medication control will enhance the safety and integrity of horseracing. As part of this endeavor, the Act, in 15 U.S.C. 3053(a)(11), directs the Horseracing Integrity and Safety Authority (“HISA” or the “Authority”) to develop proposed rules relating to “a formula or methodology for determining assessments described in section 3052(f) of this title.” The Act requires that the Authority provide to each State racing commission an estimated amount required from the State to “(i) to fund the State’s proportionate share of the

² 15 U.S.C. 3053(b)(2).

³ 15 U.S.C. 3053(b)(1).

⁴ 15 U.S.C. 3053(c)(1).

⁵ 16 CFR 1.140–1.144; *see also* Fed. Trade Comm’n, Procedures for Submission of Rules Under the Horseracing Integrity and Safety Act, 86 FR 54819 (Oct. 5, 2021).

horseracing anti-doping and medication control program and the racetrack safety program for the next calendar year; and (ii) to liquidate the State’s proportionate share of any loan or funding shortfall in the current calendar year and any previous calendar year.”⁶ A State’s proportionate share is to be based on the annual budget of the Authority, “the projected amount of covered racing starts for the year in each State” and “take into account other sources of Authority revenue.”⁷

If a State racing commission does not elect to remit fees pursuant to 15 U.S.C. 3052(f)(2), then the Authority is required to, “not less frequently than monthly, calculate the applicable fee per racing start multiplied by the number of racing starts in the State during the preceding month.”⁸ This calculation is required to be allocated equitably “among covered persons involved with covered horseraces pursuant to such rules as the Authority may promulgate”⁹ and collected “according to such rules as the Authority may promulgate.”¹⁰

With the review, input, and ultimate approval of the Authority’s Board of Directors (the “Board”), the Assessment Methodology proposed rule puts in place a methodology for determining assessments described in 15 U.S.C. 3052(f).

b. Statutory Basis

The Horseracing Integrity and Safety Act of 2020, 15 U.S.C. 3051 through 3060.

II. Self-Regulatory Organization’s Statement of the Terms of Substance of the Assessment Methodology Proposed Rule and Discussion of Alternatives

The Assessment Methodology proposed rule was guided by the purposes and objectives of the Act and the Act’s explicit directive that the Authority “allocate

⁶ 15 U.S.C. 3052(f)(1)(C)(i).

⁷ 15 U.S.C. 3052(f)(1)(C)(ii).

⁸ 15 U.S.C. 3052(f)(3)(A).

⁹ 15 U.S.C. 3052(f)(3)(B).

¹⁰ 15 U.S.C. 3052(f)(3)(C).

equitably” the calculated assessments among covered persons.¹¹ The Act states that the basis of the funding calculation is a State’s proportionate share of “the projected amount of covered racing starts for the year in each State.”¹² The Act does not define “covered racing start.” The Authority was not in favor of simply treating all racing starts in a given State uniformly as a “covered racing start” because this would result in an inequitable allocation of costs.

For example, if all starts in all races at all tracks were treated equally, West Virginia would have a larger proportionate share than Kentucky, even though the purses and entry fees generated by the Kentucky races dwarf those generated by West Virginia races.¹³ Instead, the Authority defined Annual Covered Racing Starts in a manner that is consistent with an equitable allocation of the funding needs of the Authority. Proposed Rule Series 8500 allocates 50 percent of Annual Covered Racing Starts to the number of projected starts (the “Projected Starts”) and the other 50 percent reflects the size of the purses in the applicable State.¹⁴ This latter portion of the formula is derived from taking the total amount of purses in the State and dividing that amount by the number of projected starts (the “Projected Purse Starts”). Therefore, Annual Covered Racing Starts equals 50 percent of Projected Starts and 50 percent of Projected Purse Starts. Attached as Supporting Document Exhibit 1 is a spreadsheet that guided the Authority in developing the Assessment Methodology proposed rule.¹⁵ Exhibit 1 displays the

¹¹ 15 U.S.C. 3052(f)(3)(B).

¹² 15 U.S.C. 3052(f)(1)(C)(ii).

¹³ Higher purses greatly influence the ability of Covered Persons to bear costs. It is also anticipated that stakes races and graded stakes races will have higher testing costs.

¹⁴ The Act’s requirements for proportionality among States, equitable allocation among Covered Persons within each State and the requirement imposed on the Authority to establish by rule “a formula or methodology for determining assessments” demonstrate that basing allocations on starts alone would not meet the full requirements of the Act. Therefore, the proposed rule uses the concept of Annual Covered Racing Starts to establish a weighted formula that meets all the Act’s requirements.

¹⁵ Exhibit 1 and Exhibit 2 utilize 2019 numbers because of the impact the pandemic had on 2020 numbers. Due to the timing of this submission, it was not practical to utilize 2021 numbers. The Authority will rely upon the 2021 numbers in projecting the 2022

proportionate share of each State per one million dollars and sets forth the calculations for Annual Covered Racing Starts.¹⁶

For States that do not elect to remit fees, the Authority recognized that it was not advisable or practicable to directly charge and collect from each covered person. Instead, the Assessment Methodology proposed rule places the responsibility on the covered racetracks in such States to collect the fees from covered persons, subject to the Authority's approving the racetrack's proposed assessments to covered persons. The amount each covered racetrack is responsible for collecting is based on the percentage of total purse money paid out for covered races conducted within the State over the relevant period. Supporting Document Exhibit 2 displays each covered racetrack's proportionate share in the total purses in covered horseraces in the applicable State.

III. Self-Regulatory Organization's Summary of Comments

As encouraged by the Commission's procedural rule, prior to finalization of the submissions by the Authority to the Commission, a draft of the proposed Assessment Methodology rule was made available to the public for review and comment on the HISA website, <https://www.hisausregs.org/>. On December 23, 2021, HISA representatives shared the draft proposed Assessment Methodology with several interested stakeholders for input. Those interested stakeholders included: Racing Officials Accreditation Program; Racing Medication and Testing Consortium (Scientific Advisory Committee); Water Hay Oats Alliance; National Thoroughbred Racing Association; The Jockey Club; The Jockeys' Guild; Thoroughbred Racing Association; Arapahoe Park; Grants Pass Downs; Arizona Downs; Colonial Downs; Thoroughbred Owners of California;

numbers. The Authority is relying upon Equibase data. Equibase is the official supplier of racing information and statistics to numerous entities including Breeders' Cup, Daily Racing Form, and The Jockey Club.

¹⁶ To avoid an inequitable or skewed allocation, a State's total will be adjusted so that no State's assessment exceeds 10 percent of the purses in that State. This excess amount is allocated proportionately to all States that do not exceed the maximum, based on each State's respective percentage of the Annual Covered Racing Starts.

California Horse Racing Board; National Horsemen's Benevolent and Protective Association; Thoroughbred Horsemen's Association Mid-Atlantic Safety Coalition; Thoroughbred Owners and Breeders Association; Kentucky Thoroughbred Association; American Association of Equine Practitioners; American Veterinary Medical Association; Delaware Racing Commission; New York Racing Association; Stronach Racing Group (5 thoroughbred racetracks); Churchill Downs (6 thoroughbred racetracks); Keeneland; and Del Mar. No comments regarding the Assessment Methodology proposed rule were received by the Authority from these interested stakeholders.

On December 23, 2021, the Assessment Methodology proposed rule was made available to the public for review and comment on the HISA website <https://www.hisausregs.org/>. One comment was received, and it is set forth and addressed below.

IV. Self-Regulatory Organization's Responses to Comments

One comment was posted on the HISA website in response to the Methodology Rule Proposal, which reads in full: "If a State Racing Commission enters into an agreement with the authority to conduct some or all of the requirements, (notably collecting, submitting equine samples, and enforcement of violations), will the State Commissions costs be deducted from the authority and credit given for funds dedicated to testing, etc? A reply directly to our agency would be preferable."

Although this comment does not address the Assessment Methodology proposed rule, a representative of HISA contacted the individual who posted the comment to discuss the inquiry. By way of information, it is anticipated that States that enter into voluntary agreements with the Authority will receive some type of a credit.

V. Legal Authority

This rule is proposed by the Authority for approval or disapproval by the

Commission under 15 U.S.C. 3053(c)(1).

VI. Effective Date

If approved by the Commission, this proposed rule will take effect immediately.

VII. Request for Comments

Members of the public are invited to comment on the Authority's proposed rule.

The Commission requests that factual data on which the comments are based be submitted with the comments. The supporting documentation referred to in the Authority's filing, as well as the written comments it received before submitting the proposed rule to the Commission, are available for public inspection at <https://www.regulations.gov> under docket number FTC-2022-0014.

The Commission seeks comments that address the decisional criteria provided by the Act. The Act gives the Commission two criteria against which to measure proposed rules and rule modifications: "The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—(A) this chapter; and (B) applicable rules approved by the Commission."¹⁷ In other words, the Commission will evaluate the proposed rule for its consistency with the specific requirements, factors, standards, or considerations in the text of the Act as well as the Commission's procedural rule.

Although the Commission must approve the proposed rule if the Commission finds that the proposed rule is consistent with the Act and the Commission's procedural rule, the Commission may consider broader questions about the health and safety of horses or the integrity of horseraces and wagering on horseraces in another context: "The Commission may adopt an interim final rule, to take effect immediately, . . . if the Commission finds that such a rule is necessary to protect—(1) the health and safety of covered horses; or (2) the integrity of covered horseraces and wagering on those

¹⁷ 15 U.S.C. 3053(c)(2).

horseraces.”¹⁸ The Commission may exercise its power to issue an interim final rule on its own initiative or in response to a petition from a member from the public. If members of the public wish to provide comments to the Commission that bear on protecting the health and safety of horses or the integrity of horseraces and wagering on horseraces but do not discuss whether HISA’s proposed rule on Assessment Methodology is consistent with the Act or the applicable rules, they should not submit a comment here. Instead, they are encouraged to submit a petition requesting that the Commission issue an interim final rule addressing the subject of interest. The petition must meet all the criteria established in the Rules of Practice (part 1, subpart D);¹⁹ if it does, the petition will be published in the *Federal Register* for public comment. In particular, the petition for an interim final rule must “identify the problem the requested action is intended to address and explain why the requested action is necessary to address the problem.”²⁰ As relevant here, the petition should provide sufficient information for the public to comment on, and for the Commission to find, that the requested interim final rule is “necessary to protect—(1) the health and safety of covered horses; or (2) the integrity of covered horseraces and wagering on those horseraces.”²¹

VIII. Comment Submissions

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “HISA Assessment Methodology” on your comment. Your comment—including your name and your State—will be placed on the public record of this proceeding, including, to the extent practicable, on the website <https://www.regulations.gov>.

¹⁸ 15 U.S.C. 3053(e).

¹⁹ 16 CFR 1.31; *see* Fed. Trade Comm’n, Procedures for Responding to Petitions for Rulemaking, 86 FR 59851 (Oct. 29, 2021).

²⁰ 16 CFR 1.31(b)(3).

²¹ 15 U.S.C. 3053(e).

Because of the public health emergency in response to the COVID-19 outbreak and the Commission's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website. To ensure that the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write "HISA Assessment Methodology" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex B), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the public record, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other State identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "[t]rade secret or any commercial or financial information which . . . is privileged or confidential"—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule §4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer

names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule §4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule §4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at <https://www.regulations.gov>—as legally required by FTC Rule §4.9(b), 16 CFR 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule §4.9(c), and the General Counsel grants that request.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before [INSERT DATE 14 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/siteinformation/privacypolicy>.

IX. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or Commissioner’s advisor, will be placed on the public record. *See* 16 CFR 1.26(b)(5).

X. Self-Regulatory Organization’s Proposed Rule Language

Rule 8500 Series – Methodology for Determining Assessments

8510 Definitions

8520 Annual Calculation of Amounts Required

8300 Disciplinary Hearings and Accreditation Procedures

8310 Application

8320 Adjudication of Violations of Established in the Rule 2200 Series

8330 Adjudication of Rule 8100 Violations
8340 Initial Hearings Conducted Before the Racetrack Safety Committee or the Board of the Authority
8350 Appeal to the Board
8360 Accreditation Procedures
8370 Final Civil Sanction
8400 Investigatory Powers

8500. Methodology for Determining Assessments.

8510. Definitions.

For purposes of this Rule 8500 Series:

(a) *Annual Covered Racing Starts* means, for the following calendar year, the sum of: (i) 50 percent of the number of Projected Starts; plus (ii) 50 percent of the number of Projected Purse Starts.

(b) *Covered Horserace* has the meaning set forth in 15 U.S.C. 3051(5).

(c) *Projected Starts* means the number of starts in Covered Horseraces in the previous 12 months as reported by Equibase, after taking into consideration alterations in the racing calendar of the relevant State(s) for the following calendar year.

(d) *Projected Purse Starts* means: (i) the total amount of purses for Covered Horseraces as reported by Equibase (not including the Breeders' Cup World Championships Races), after taking into consideration alterations in purses for the relevant State(s) for the following calendar year, divided by (ii) the Projected Starts for the following calendar year.

(e) *Racetrack* has the meaning set forth in 15 U.S.C. 3051(15).

8520. Annual Calculation of Amounts Required.

(a) If a State racing commission elects to remit fees pursuant to 15 U.S.C. 3052(f)(2), the State racing commission shall notify the Authority in writing on or before May 2, 2022 of its decision to elect to remit fees.

(b) Not later than April 1, 2022, and not later than November 1 of each year thereafter, the Authority shall determine and provide to each State Racing Commission the

estimated amount required from each State pursuant to the calculation set forth in Rule 8520(c) below.

(c) Upon the approval of the budget for the following calendar year by the Board of the Authority, and after taking into account other sources of Authority revenue, the Authority shall allocate the calculation due from each State pursuant to 15 U.S.C. 3052(f)(1)(C)(i) proportionally by each State's respective percentage of the Annual Covered Racing Starts. The proportional calculation for each State's respective percentage of the Annual Covered Racing Starts shall be calculated as follows:

(1) the total amount due from all States pursuant to 15 U.S.C. 3052(f)(1)(C)(i) shall be divided by the Projected Starts of all Covered Horseraces; then

(2) 50 percent of the quotient calculated in (c)(1) is multiplied by the quotient of (i) the relevant State's percentage of the total amount of purses for all Covered Horseraces as reported by Equibase (not including the Breeders' Cup World Championships Races), after taking into consideration alterations in purses for the relevant State for the following calendar year; divided by (ii) the relevant State's percentage of the Projected Starts of all Covered Horseraces starts; then

(3) the sum of the product of the calculation in (c)(2) and 50 percent of the quotient calculated in (c)(1) is multiplied by the Projected Starts in the applicable State.

Provided however, that no State's allocation shall exceed 10 percent of the total amount of purses for Covered Horseraces as reported by Equibase in the State (not including the Breeders' Cup World Championships Races). All amounts in excess of the 10 percent maximum shall be allocated proportionally to all States that do not exceed the maximum, based on each State's respective percentage of the Annual Covered Racing Starts.

(d) Pursuant to 15 U.S.C. 3052(f)(2)(B), a State racing commission that elects to remit fees shall remit fees on a monthly basis and each payment shall equal one-twelfth of the estimated annual amount required from the State for the following year.

(e) If a State racing commission does not elect to remit fees pursuant to 15 U.S.C.

3052(f)(2):

(1) The Authority shall on a monthly basis calculate and notify each Racetrack in the State of the applicable fee per racing start for the next month based upon the following calculations:

(i) Calculate the amount due from the State as if the State had elected to remit fees pursuant to 15 U.S.C. 3052(f)(2) (the “Annual Calculation”).

(ii) Calculate the number of starts in Covered Horseraces in the previous twelve months as reported by Equibase (the “Total Starts”).

(iii) Calculate the number of starts in Covered Horseraces in the previous month as reported by Equibase (the “Monthly Starts”).

(iv) The applicable fee per racing start shall equal the quotient of Monthly Starts, divided by Total Starts, multiplied by the Annual Calculation.

(2) The Authority shall on a monthly basis calculate and notify each Racetrack in the jurisdiction of the following calculations:

(i) Multiply the number of starts in Covered Horseraces in the previous month by the applicable fee per racing start calculated pursuant to paragraph (e)(1)(iv) above.

(ii) The calculation set forth in 15 U.S.C. 3052(f)(3)(A) shall be equal to the amount calculated pursuant to paragraph (e)(2)(i) (the “Assessment Calculation”).

(3) The Authority shall allocate the monthly Assessment Calculation proportionally based on each Racetrack’s proportionate share in the total purses in Covered Horseraces in the State over the next month and shall notify each Racetrack in the jurisdiction of the amount required from the Racetrack. Each Racetrack shall pay its share of the Assessment Calculation to the Authority within 30 days of the end of the monthly period.

(4) Not later than May 1, 2022 and not later than November 1 each year thereafter, each Racetrack in the State shall submit to the Authority its proposal for the allocation of the

Assessment Calculation among covered persons involved with Covered Horseraces (the “Covered Persons Allocation”). On or before 30 days from the receipt of the Covered Persons Allocation from the Racetrack, the Authority shall determine whether the Covered Persons Allocation has been allocated equitably in accordance with 15 U.S.C. 3052(f)(3)(B), and, if so, the Authority shall notify the Racetrack that the Covered Persons Allocation is approved. If a Racetrack fails to submit its proposed Covered Person Allocation in accordance with the deadlines set forth in this paragraph, or if the Authority has not approved the Covered Persons Allocation in accordance with this paragraph, the Authority shall determine the Covered Persons Allocation for the Racetrack. Upon the approval of or the determination by the Authority of the Covered Persons Allocation, the Racetrack shall collect the Covered Persons Allocation from the covered persons involved with Covered Horseraces.

(f) All notices required to be given to the Authority pursuant to the Act and these rules must be in writing and must be mailed to 401 West Main Street, Suite 222, Lexington, Kentucky 40507, and emailed to *feedback@hisaus.org*.

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2022-03717 Filed: 2/17/2022 8:45 am; Publication Date: 2/18/2022]